



Law Society
of Scotland

Consultation Response

Short Term Lets: Consultation on draft Licensing Order and Business and Regulatory Impact Assessment (BRIA)

13 August 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Licensing Law, Planning and Rural Affairs sub-committees welcome the opportunity to consider and respond to the Scottish Government consultation on “Short Term Lets: Consultation on draft Licensing Order and Business and Regulatory Impact Assessment (BRIA)” (the consultation.)¹

The sub-committees have the following comments to put forward for consideration.

General

The Scottish Government first consulted in April 2019 regarding short-term lets to which we responded in July 2019.² In January 2020, the Scottish Government confirmed that they intended to establish a licensing scheme for short-term lets using powers under the Civic Government (Scotland) Act 1982 (the 1982 Act). That was followed by a consultation in September 2020 to which we responded in October 2020.³ That was followed by the Scottish Parliament’s Local Government Committee Call for Evidence on the draft Civic Government (Scotland) Act 1982 (Licensing of short term lets) Order to which we responded in January 2021.⁴ That Order was then subsequently withdrawn.

Many of the issues which have been raised previously by the subcommittees remain relevant. We had the opportunity to highlight many of these in our recent meeting with Scottish Government officials on 9 August. These related to both the consultation and specifically, the draft Licensing Order (the draft Order) and draft Business and Regulatory Impact Assessment (BRIA) and the draft Guidance which is proposed to support the licensing scheme in due course.

Our main concerns reflected that once the draft Order is laid and passed that it needs to be right. Principally, there appears to be confusion between the requirements of the separate planning and licensing schemes. These have separate purposes which need to be respected albeit that short term lets will

1 <https://consult.gov.scot/housing-and-social-justice/short-term-lets-draft-licensing-order-and-bria/>

2 <https://www.lawscot.org.uk/media/363183/19-07-19-plan-lic-short-term-lets.pdf>

3 <https://www.lawscot.org.uk/media/369667/20-10-16-plan-lic-consultation-short-term-lets-regulations.pdf>

4 <https://www.lawscot.org.uk/media/370300/21-01-22-plan-lic-short-term-let-regulations.pdf>

operate under one local authority but crucially, by them wearing different hats. Since the operation of the short term lets is not being set up by new and specific bespoke legislation but instead seeks to add onto the existing schemes set up under the 1982 Act where current caselaw and practices prevail. In setting up a licensing regime, the focus for licensing is about the fit and proper person being the person responsible for the short term let. As the draft Order stands, we consider that the risk of challenge is high - and this could potentially follow on from what has been a high-profile and to an extent controversial decision to proceed by a licensing scheme for short term. That confusion needs resolved before the draft Order should be laid.

It is important to note that the consultation focuses on the draft Order. However, the consultation is accompanied at the same time by discussions as to the draft Guidance which is proposed to be published once the short term lets scheme is in place.

For clarity, the consultation refers to the draft Order (referred to as Paper 2⁵), the BIRA (referred to as Paper 3⁶), the draft licensing guidance intended for hosts and operators of short-term lets in Scotland (referred to as Paper 4⁷), draft licensing guidance Part 2 is intended for Scottish licensing authorities, letting agencies and platforms facilitating short-term lets in Scotland (referred to as paper 5⁸) and draft planning guidance is intended for hosts and operators of short-term lets (referred to as paper 6⁹). For clarification, we have no further observation in relation to Paper 6.

Guidance

It is unusual that draft Guidance (Papers 4 and 5) is being drafted before the policy as set out in the draft Order on the short term lets is finalised. We support the premise of the issue of Guidance, and it needs to be positive and be helpful and supportive to all who seek to consult it. This is especially so as we have commented on the over-provision sections of the draft Guidance (Paper 4) which in our view tend to conflate the planning and licensing aspects which we outline more fully below. We are including in this consultation response observations on the draft Guidance intended for hosts and operators of short-term lets in Scotland. This will help illustrate some of the difficulties to which we refer.

Regarding the draft Guidance Part 2 intended for Scottish licensing authorities, letting agencies and platforms facilitating short-term lets in Scotland (Paper 5), we have not yet completed our revision. You have

5 short-term-lets-consultation-no-3-paper-2-draft-licensing-order-policy-note.pdf

6 <https://www.gov.scot/publications/short-term-lets-licensing-scheme-planning-control-area-legislation-draft-business-regulatory-impact-assessment-bria/>

7 <https://www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-2-supplementary-guidance-licensing-authorities-letting-agencies-platforms/>

8 <https://www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-2-supplementary-guidance-licensing-authorities-letting-agencies-platforms/>

9 <https://www.gov.scot/publications/short-term-lets-scotland-planning-guidance-hosts-operators/>

advised that you are going to let us have the date by which this is required¹⁰. Many of the issues will be in similar terms to those already flagged in relation to paper 4.

In relation to the draft Guidance, as part of the draft Order, we would seek the inclusion of a requirement that both sets of Guidance are kept under regular review once they are published and that the responsibility for their maintenance is clarified. We have voiced concerns about Guidance previously that is unclear and is not kept up to date to reflect changes in the law. It is easiest given the work going forward if this is specifically set out as a legislative requirement. This ties in with our observations that the Guidance is not legal advice and cannot be relied upon in that sense. The status and ownership of the Guidance must also be made clear.

Timescales/Resources

We have noted from the consultation that the proposed timescales for applications from the licensing authorities is intended to be 1 October 2022. This is to give them sufficient time to prepare, given that the legislation and guidance will not be in final form until later this year. However, there are no plans to change the 1 April 2023 date by which existing hosts and operators must have applied for a licence to keep operating, nor the 1 April 2024 date by which all short-term lets in Scotland must be licensed.

As we have indicated previously, there are significant implications arising from these timescales for the licensing authorities. We are concerned with the internal resourcing that will be required and if that provides sufficient time. Some reassurance should be sought to confirm support for these timescales on the proposed implementation.

We respond to the Consultation as follows:

For Paper 2: Draft Licensing order

We have the following observations to make:

Overprovision: We do not consider that the implications of these provisions have been fully thought through. This touches on conflating licensing and planning matters. If the issue is not fully resolved now, we suspect that this is going to remain a significant area of challenge, given the existence of these somewhat blurred lines. Please see our comments at section 4 on the draft Guidance (Paper 4)¹¹ on the way in which it purports to deal with overprovision.

¹⁰ Now understood to be 3 September 2021

¹¹ See reference to 4.2 at licensing authority and policies on overprovision- this would be a planning matter.

When considering the implications for overprovision, as we explained, please consider what the “mischief” is. Why include this as a mandatory provision for licensing? This also risks duplication with other areas of policy in planning. With this potential for conflict, Ministers could refuse to grant a planning STL control zone but thereafter the Local Authority may write up an overprovision policy that could have a similar effect.

Notifications: We consider that there are various aspects which seem problematic. The proposal that notification should be undertaken for all within 20m is disproportionate compared to other regimes such as alcohol licensing where the equivalent area is 4m. (See section 3 of the draft Guidance (paper 4)). This will be very burdensome for local authorities, particularly in densely populated/city centre areas.

Local authorities do not have the resources to cope with site notifications rather than placing the obligation on the applicant to notify as they are best placed to do so, and which forms the current licensing practice. It is much easier for the applicant to undertake and not the local authority.

We do not understand the policy justification why short term lets should put in a different scheme. Problems may also arise if the notification required lies in private property as to how practically, the local authority could place that notice where they have no right of entry under statute or otherwise.

Issues of competency following the grant of a short term let may well arise if notices have not been displayed in accordance with the requirements. Section 2(7) of Schedule 1 of the 1982 Act sets out the public licence requirements quite clearly – why the short term lets should seek to change them is unclear on what appears to operate effectively meantime. This is not a new regime but involves the use of existing legislation to put in place the proposed new short term let licensing scheme.

Appeals: As we have advised previously, the draft Order does not include any appeal mechanisms. Consideration should be given to the inclusion of an appeal scheme as this should apply in respect of the grant of a licence and/or any refusal of a licence. This is only fair to avoid recourse to judicial review which is expensive, challenging and time consuming. The European Union Services Directive may apply in respect of appeal provisions.

Unconventional accommodation: The draft Guidance refers to unconventional accommodation. However, we consider that there is a lack of a clear definition. While it may not be possible to be too prescriptive there should be clarity over how many licences would or should be required. Where there are obvious types of unconventional accommodation, this should be included rather than left to piecemeal development or open to differing interpretation by the various local authorities.

Duplication of mandatory conditions: We have concerns about the duplication of conditions under the separate planning and licensing regimes. We predict that this is also going to cause other issues in respect of building standards and fire safety. This may go onto to have implications for different Local Authorities if they provide for or require different standards of evidence etc. for the mandatory conditions. Compliance may vary – which makes it difficult for those operating across different local authority regions.

Temporary licences: We do not consider that the temporary licence scheme has been well explained. What kind of exemption applies in respect of holiday lets? Where we are concerned is that it will be up to local authorities to set in place any exemptions. In addition, for instance, when a specific event takes place, if those wishing to let need to obtain licences and in effect pay for obtaining a licence, this could significantly deter them. We would highlight events such as golfing venues such as Gleneagles where accommodation is scarce. We do not consider that this be what is intended by the scheme.

Revocation of a licence: What happens when a licence is revoked? How is this going to be achieved once the licence is in force?

Accreditation: We have some concerns regarding the accreditation provisions. See sections 3.13 and 3.14 of the draft Guidance. There are several platforms named there and these are only a few who operate in the short-term let market – and the draft Guidance should not seek to promote one platform over another. The responsibility of the management of the short term lets is with Scottish Government who should discharge their responsibilities in this regard and not delegate responsibility.

Excluded tenancies: We note that the Schedule 2, paragraph 2(f) of the draft Order sets out excluded tenancies under the regime including “a tenancy of a house on a croft” and similarly, for small landholdings in paragraph 2(g).

We are not clear why the draft Order does not simply exclude “the tenancy of a croft (within the meaning of section 3 of the 1993 Act)” itself, and similar for small landholdings, as per the position with the other tenancies under this paragraph.

A croft is let as a whole unit, including any permanent improvement on it such as a dwelling-house. The interaction with section 27 of the Crofters (Scotland) Act 1993 may require consideration - it appears that any sublet by a crofter will not be an excluded tenancy under Schedule 2, paragraph 2(f).

Miscellaneous: There are a few other aspects on which we would focus attention:

The definition of "host" refers to 'otherwise exercises control'. We would suggest that this be expanded to read “otherwise exercises control over occupation and use.”

The definition of "accommodation" refers to 'an accommodation unit' but 'unit' is not defined anywhere within the draft Order.

At Article 7 of the draft Order, the reference to activity designated by Article 3 should refer to Article 4.

The exclusion of student accommodation from the Control Area Regulations does not align with the exclusion of student accommodation and student tenancies in Schedule 1 of the draft Order. The definition of student accommodation in paragraph 2 of Schedule 1 of the Control Area Regulations as repeated in paragraph 4 (3) of Schedule 4 of the draft Order currently refers to residential accommodation which has been built or converted solely for the purpose of being provided to students. We would suggest that the definition in both paragraphs 2 and 4(3) be amended to refer to residential accommodation which has been

built or converted pre-dominantly for the purpose of being provided to students. This amendment would reflect the language used when excluding student tenancies from the short term let licensing and private residential tenancies regimes.

Draft Business and Regulatory Impact Assessment (BRIA)

The purpose in licensing short-term lets is to balance the needs and concerns of their communities with wider economic and tourism interests. The draft Order seeks to establish a licensing scheme to ensure short-term lets are safe and address issues faced by neighbours and to facilitate local authorities in knowing and understanding what is happening in their area and handling complaints effectively.

We agree that this is the main purpose of the inclusion of licensing, but we have concerns over several the terms of the draft Order as highlighted above. If the requirements on those seeking to let their property are too onerous or expensive, then they will be deterred from operating short term lets which is not the purpose in providing for a licensing scheme. It is important to maintain or indeed achieve that balance.

There are concerns in bringing in this system as a Scotland wide policy that this will adversely affect rural areas and the availability of short- term lets. For instance, the effect/financial impact on the small-time individual lessor, who perhaps uses an old family home very occasionally for a holiday let, will be disproportionately far greater than on a commercial business whose raison d'etre is the letting of properties on a short-term basis.



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